Fair Political Practices Commission
June 28, 2002

Legislative Bill Analysis
AB 13

Assembly Bill 13 (Florez)
Campaign: Definition: Administrative Action
Version: As amended, June 24, 2002
Status: In Senate Rules

Summary of Proposed Bill

Expands the definition of lobbyist by expanding the definition of "administrative action" to include the "solicitation, proposal, drafting, development, consideration, awarding, amendment, implementation, oversight, or funding of any contract between a state agency and any person, under which the person provides goods or services to the state agency."

Existing Law and Regulations

Existing Government Code section 82002 defines "administrative action" as "the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding . . . " (The statute also defines "ratemaking proceeding" and "quasi-legislative proceeding.") "Administrative action"" is a common term in the Act, used in approximately 20 statutes and more than a dozen regulations. Generally speaking, the term is relevant in two distinct settings: lobbyist reporting and registration rules, and revolving-door provisions.

Discussion and Policy Considerations

<u>Expands the definition of lobbyist</u>

Assembly Bill 13 would change the scope of the definition of a lobbyist by expanding the conduct that qualifies a person as a lobbyist (82039), lobbying firm (82038.5) or lobbyist employer (82039.5). As a result, the amendment will require registration and reporting by individuals or entities who are not now subject to the lobbyist rules. For instance, sales personnel may become lobbyists under 82039, subject to all the rules governing the conduct and reporting of lobbying activities. This is because many of the lobbyist/lobbyist-employer reporting and qualification rules hinge on the activities intended to "influence" legislative or administrative action. Section 82032 broadly defines that conduct as "promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action **by any means**, including but not limited to the provision or use of information, statistics, studies or analyses." (§ 82032.) Providing information regarding a contract, such as salary/time expenditure triggers, may trigger the lobbyist qualification.

As a result, an individual who spends one-third or more if his/her compensated time in a calendar month engaging in direct communication on behalf of his/her employer to influence the contract process would qualify as a lobbyist. An individual who provides these services to a client, rather than his/her employer, will become a lobbyist if he/she receives or becomes entitled to receive

$2,000 or more in a calendar month for the purpose of engaging in direct communication on behalf of the client. (Regulation 18239(a) – (c).)

Direct communication means appearing as a witness before, talking to (either by telephone or in person), corresponding with, or answering questions or inquiries from officials of the agency. There are exceptions for "administrative testimony" (testimony given in a public hearing), and for individuals who only provide technical data or analysis to an agency. (Regulations 18239(d).)

An individual who lobbies on behalf of clients, as opposed to his/her employer, is a lobbying firm. (Section 82038.5.) An entity that employs a lobbyist or contracts with a lobbying firm is a lobbyist employer. (Section 82039.5.) In addition, persons that do not employ a lobbyist or contract with a lobbying firm can incur reporting obligations if the person spends $5,000 or more in a calendar quarter engaging in direct communication or soliciting others to do so. (See sections 82045 and 86115.)

Under AB 13, any individual or entity attempting to sell products or services to a state agency could qualify as a lobbyist, lobbying firm, lobbyist employer, or $5,000 filer, with all of the applicable reporting requirements and restrictions, including the $10 lobbyist gift limit in section 86203, the prohibition on contributions in section 85702, and the prohibition on contingency fees in section 86205(f). The lobbyists also would be required to attend the ethics training conducted by the Legislature.

The new language is extremely broad. It appears to cover the bidding process ("solicitation") as well as activities that occur after a contract has been signed ("implementation" and "oversight"). If an agency enters into a contract for consulting services, conversations the consultant has with agency officials after the contract is signed may be considered attempting to influence administrative action.

As mentioned above, an individual who qualifies as a lobbyist under this section would be prohibited from accepting contingency fees. This could be a problem for salespeople who work on commission.

We may want to suggest to the author some alternative approaches, depending on which provisions he wishes to include. For example, is it the author's intent that salespeople and other individuals involved in contracting become lobbyists, with all of the applicable restrictions, or would it be sufficient to require disclosure by the business entity of amounts spent to secure a contract?

Other affected areas of the Political Reform Act

It is important to remember that lobbyists are prohibited from making contributions to the elected officials they lobby. If the number of individuals considered lobbyists were to grow as a result of a broadened definition, this growth would undermine one of the grounds on which the current prohibition against contributions by lobbyists (section 85702) was upheld. The court determined that the prohibition was constitutional in part because the definition of "lobbyist" and its application through our regulations is considerably more narrow than the 1974 version which was struck down.

Lobbyists also are expressly prohibited in section 86205 from doing anything to deceive any legislative or agency official (state employee) regarding a material fact pertinent to a pending administrative action. Thus, an amendment that brings sales personnel into the scheme arguably may bring commercial speech into the purview of the Act and result in potential violations occurring as a result of traditional "puffery" and other types of marketing representations.

Revolving door provisions

With respect to the revolving door provisions, the Act prohibits former state employees and officers from representing any person before the former state administrative agency with an intent to influence any judicial, quasi-judicial or other proceeding in which the former employee participated. (§ 87401.) "Judicial, quasi-judicial or other proceeding" is defined to include contracts within this permanent ban framework. (§ 87400.) In addition, the one-year ban on lobbying one's former agency applies to appearances "made for the purpose of influencing administrative or legislative action." In the past, Commission staff has made a distinction between the application of the one-year ban versus the permanent ban on the basis that influencing "administrative or legislative action" (which currently does not include contract proceedings) is different from judicial or quasi-judicial proceedings. In other words, the one-year ban may start to apply to proceedings involving the rights of certain parties because of the change in the definition of "administrative action."

While the distinction between the permanent ban and the one-year ban may be lessened, it does not appear that the bill would lift the permanent ban as it applies to contract proceedings. This view is based essentially on the fact that the legislation does not amend section 87400, subdivision (c), which expressly includes contract proceedings. Arguably, however, given the extra specificity of the bill's language with respect to 82002, the one-year ban may reach more conduct with respect to contract proceedings.

We also have advised that the current one-year ban does not prohibit advice to third parties so long as the representation is not apparent before the former agency. The bill's reach, however, extends to solicitation, proposal, drafting, development and oversight of a contract. A question arises whether this bill would prohibit advice to third parties from someone subject to the one-year ban.

Third-party contracts

Another issue which may not in fact be a problem: The proposed language refers to contracts between a state agency and any person, under which the person "provides goods or services to the state agency." The question arises whether certain other contracts are left out or whether this is intended to cover all possible types of contracts. If the latter, the arguable limiting words quoted above may present interpretative problems in conflict with its intended scope. On the other hand, no other type of contract comes to mind, in which case the words do not present a problem.

The new language refers to a contract between a state agency and any person under which “the person” provides goods or services to the agency. It appears that attempts by third parties to influence a contract would not be covered. For example, if Microsoft had attempted to convince

General Services not to sign the contract with Oracle, Microsoft's activities would not be covered by this section.

Fiscal Impact

The fiscal impact on the agency could be significant. There will be an increase in requests for telephone advice. The change may necessitate changes to the lobbying disclosure forms, and certainly to the lobbying manual. Some sort of broad outreach program may also be needed.

Recommendation: No recommendation at this time. Staff will provide a recommendation at the Commission hearing.